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In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES DEPARTMENT OF JUSTICE,
PETITIONER

v.

EVELYN FALKOWSKI

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Administrative Procedure Act, 5 U.S.C. 701-706, authorizes judicial review of the Department of Justice's decision not to provide legal representation for a federal employee who was sued for damages in her individual capacity for actions undertaken on the job.

2. If the Department's decision is subject to review, whether the court of appeals applied the proper scope of review in overturning that decision.

PARTIES TO THE PROCEEDING

The United States Department of Justice is the only petitioner, and Evelyn Falkowski is the only respondent. The Equal Employment Opportunity Commission was a defendant-appellee below, but we do not seek review of any portion of the court of appeals' judgment affecting the Commission (see note 3, *infra*).

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the United States Department of Justice, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-27a) is reported at 719 F.2d 470. The opinion on denial of rehearing (App., *infra*, 35a-38a) is not yet reported. The opinion of the district court (App., *infra*, 28a-31a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 14, 1983. A petition for rehearing was denied on January 12, 1984. By order of April 5, 1984, the Chief Justice extended the time within which to file

a petition for a writ of certiorari until June 10, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

Relevant provisions of the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, as well as the statutes (28 U.S.C. 516, 517, 519) and regulations (28 C.F.R. 50.15, 50.16) that govern the provision of government legal representation for federal employees who are sued in their individual capacities, are reprinted at App., *infra*, 39a-47a).

STATEMENT

1. This case grows out of an acrimonious, decade-long dispute between two employees of the Equal Employment Opportunity Commission (EEOC): respondent Evelyn Falkowski, formerly director of the Birmingham, Alabama, office, and Bertram Perry, formerly the deputy director of that office. Respondent was appointed to her position in the Birmingham office in 1974 pursuant to a consent decree settling her suit against the EEOC for sexual discrimination. Shortly after her transfer, the conflict with Perry began. App., *infra*, 3a. "Perry alleged that the friction stemmed from his justified protests against [respondent's] mismanagement," while respondent attributed the conflict to "rank insubordination" and Perry's "oppressive behavior" (*ibid.*).

The EEOC attempted to transfer both respondent and Perry, but both brought suit to block their transfers (App., *infra*, 4a). Respondent, who is white, first filed administrative complaints charging her black, male superiors in the EEOC with sexual and racial discrimination (*id.* at 4a n.2). She then brought suit in the United States District Court for the Northern District of Alabama, alleging breach of the 1974 consent decree (*id.* at 4a). Perry, who is black, sued respondent and

other EEOC supervisors in the same court, claiming racial discrimintion and retaliation for "whistle-blowing" (*ibid.*). See *Perry* v. *Golub*, 400 F. Supp. 409 (N.D. Ala. 1975), vacated as moot, 594 F.2d 862 (5th Cir. 1979). After a hearing in which EEOC attorneys represented respondent and the other defendants, the district court enjoined Perry's transfer; respondent's transfer was likewise suspended by informal agreement (App., *infra*, 5a).

In 1976, the district court dismissed respondent as a defendant in Perry's suit. Respondent unsuccessfully appealed the dismissal, claiming that the EEOC attorneys had inadequately represented her and that she wished to remain in the case to clear her name (*ibid.*). Since then, "[n]umerous other controversies have emerged in the *Perry* v. *Golub* litigation" (App., *infra*, 6a).

2. In the meantime, respondent set out to gather evidence of Perry's insubordination. Without Perry's knowledge she recorded a conversation with Perry in her office in 1977. The recording revealed not only insubordination but "a regrettable stream of obscenities and racial epithets" on Perry's part. App., *infra*, 7a. As a result of this incident, the EEOC sought (unsuccessfully) to discharge respondent for violating its rule barring such recordings (EEOC Order 165); it also moved (unsuccessfully) to discharge Perry based on the contents of his remarks. App., *infra*, 7a.

Perry then filed suit in the Northern District of Alabama against respondent and EEOC chairwoman Eleanor Holmes Norton. In 1981, Perry obtained voluntary dismissal of this action. Respondent unsuccessfully sought leave to file counterclaims against Perry; she also failed in her efforts to recover costs and attorneys fees from Perry and the Commission. App., *infra*, 8a; see *Perry* v. *Falkowski*, No. CV78-PT-0935-S (N.D.

Ala. July 22, 1981), aff'd, No. 81-7643 (11th Cir. Oct 25, 1982), cert. denied, No. 82-1914 (Oct. 3, 1983).

3. After Perry filed his second suit against respondent, respondent requested that the government provide her with legal representation (App., *infra*, 11a). After some delay, the EEOC, in accordance with the applicable regulations (28 C.F.R. 50.15, 50.16), sent the Department of Justice a letter requesting representation for respondent and certifying that "'although [respondent] acted improperly [in recording the conversation] she was acting within the scope of her duties.'" C.A. App. 102-103; App., *infra*, 11a-12a.

The Department of Justice denied the representation request. In a letter to respondent and the EEOC, Assistant Attorney General Barbara Babcock of the Civil Division explained (App., *infra*, 12a):

> In light of the clearly personal nature of the dispute between Ms. Falkowski and Mr. Perry giving rise to the litigation, the tape recording by Falkowski of Mr. Perry's remarks in contravention of an internal EEOC directive, and the existence of separate actions by Ms. Falkowski and Mr. Perry challenging proposed personnel actions against them, I do not believe it is in the interest of the United States to reimburse Ms. Falkowski for her legal costs. Accordingly, pursuant to 28 C.F.R. § 50.15(a)(2), I am denying Ms. Falkowski's request.

4. Respondent then brought suit against the EEOC and the Justice Department in the United States District Court for the District of Columbia. Among other things, she claimed that the Justice Department had violated the Administrative Procedure Act, 5 U.S.C. 706, by arbitrarily and capriciously refusing to provide her with legal representation in *Perry* v. *Falkowski*, *supra*.[1]

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[1] She also alleged that the EEOC had violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. (& Supp. V) 2000e *et seq.*,

The district court granted summary judgment for the government, holding that Assistant Attorney General Babcock's letter set forth adequate reasons for her conclusion that providing representation would not be "in the interest of the United States" (App., *infra*, 30a).[2] The court therefore found it unnecessary to address the government's contention that its decision not to furnish representation was exempt from judicial review under the APA (*ibid.*).

5. The court of appeals reversed the summary judgment on respondent's claim against the Justice Department (App., *infra*, 21a-26a).[3] The court held that the

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by denying her adequate government legal representation in *Perry* v. *Golub*, *supra*, and by improperly handling her request for representation in *Perry* v. *Falkowski*, *supra* (App., *infra*, 13a, 28a-29a).

Respondent further alleged violations of the First and Fifth Amendments. These constitutional claims were dismissed by the district court, and respondent did not contest their dismissal on appeal. App., *infra*, 13a n.11.

[2] The court also granted summary judgment for the EEOC and the Justice Department on respondent's Title VII claims (see App., *infra*, 28a-30a). The court held (*id.* at 28a n.1) that respondent's claim regarding the representation provided in *Perry* v. *Golub*, *supra*, was barred because respondent did not file an administrative complaint with the EEOC within the time required. With respect to respondent's claim regarding the EEOC's handling of her request for representation in *Perry* v. *Falkowski*, *supra*, the court noted (App., *infra*, 29a-30a) that the EEOC had done all that it could by asking that the Justice Department grant respondent's request and by providing the Department with the necessary information.

[3] The court of appeals affirmed the grant of summary judgment in favor of the EEOC on respondent's Title VII claim regarding the government representation provided in *Perry* v. *Golub*, *supra* (App., *infra*, 16a-19a). The court held (*id.* at 18a) that respondent was collaterally estopped from asserting that claim by virtue of an adverse decision on that issue in the *Perry* v. *Golub*, *supra*, litigation itself.

The court reversed the grant of summary judgment for the EEOC on respondent's Title VII claim regarding the EEOC's

Department's decision not to provide representation was subject to judicial review under the APA and did not fall within the exception in 5 U.S.C. 701(a)(2) for action "committed to agency discretion by law" (App., *infra*, 21a n.16). In reaching this conclusion, the court relied on *Natural Resources Defense Counsel, Inc.* v. *SEC*, 606 F.2d 1031, 1043-1047 (D.C. Cir. 1979), in which the court concluded (*id.* at 1043-1044) that the applicability of Section 701(a)(2) "turns on pragmatic considerations," including particularly "the need for judicial supervision to safeguard the interests of the plaintiffs; the impact of review on the effectiveness of the agency in carrying out its congressionally assigned role; and the appropriateness of the issues raised for judicial review." In applying those factors here, the court opined summarily in a footnote (1) that persons denied representation are "entitled" to an agency decision that is "at least rational and free from abuse of discretion"; (2) that review could in "most" cases be "handled" at the "dismissal or summary judgment" stage and therefore will not prove burdensome; and (3) that the subject is not inappropriate for judicial review because the court's scrutiny "is in most cases limited to determining whether the reasons articulated by the agency make sense," a task which the court said is not "beyond our powers" (App., *infra*, 21a-22a n.16).

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handling of her representation request in *Perry* v. *Falkowski*, *supra* (App., *infra*, 19a-21a). The court held (*id.* at 20a-21a) that "the bare fact of formal Commission recommendation was not sufficient" and that "[t]he relevant factual inquiry instead should have been whether [the] EEOC acting out of discriminatory animus intentionally mishandled [respondent's] request so as to undercut the force of its formal recommendation on paper." Acknowledging (*id.* at 20a) that this test "places a heavy burden" on respondent, the court found (*id.* at 20a-21a) that there were genuine issues of material fact that precluded summary judgment. We do not seek review of this ruling.

The court then conducted a detailed review of the government's reasons for refusing to provide representation in this case (App., *infra*, 22a-25a) and concluded that those reasons were "facially insufficient" (*id.* at 21a). The court found that "'the clearly personal nature of the dispute between [respondent] and Mr. Perry'" did not provide a "rational reason" for denying representation because "government counsel represent federal officials as defendants in quite acrimonious Title VII actions on a regular basis" (*id.* at 23a). The court likewise concluded that respondent's violation of an EEOC rule by surreptitiously tape recording the conversation with Perry could not justify the government's refusal to provide her with representation because the government has sometimes paid for private counsel to represent federal officials who were sued in their individual capacities and who also happened to be under federal criminal investigation at the time (*id.* at 23a-24a). The court held that representation could not be denied to respondent on the basis of the overlapping suits in which she and Perry were challenging the EEOC's efforts to discharge them (*id.* at 24a-25a). The court stated (*id.* at 24a) that this rationale was "the least satisfactory" and "appear[ed] retaliatory."[4] Finally, the court suggested that respondent was accorded "disparate treatment" because the court's extra-record review of the government's handling of representation requests indicated that denials "were apparently few and far between" (*id.* at 25a).

The government's petition for rehearing was denied with Judges Bork, Scalia, and Starr voting for rehear-

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[4] The court also rejected the government's argument that respondent's claim for reimbursement of attorney's fees was barred by sovereign immunity (App., *infra*, 26a n.16). Although we disagree with the court's holding, we do not seek review of this question.

ing en banc (App., *infra*, 33a-34a). In a statement joined by Judge Scalia, Judge Starr wrote (*id.* at 36a):

> In my view a court cannot appropriately demand reasons for litigation decisions statutorily entrusted to the Attorney General or his representatives in order to evaluate judicially whether those decisions, in the panel's words, "make sense" under the APA.

Observing (*id.* at 35a) that this case involves "an issue of * * * grave importance under bedrock principles of separation-of-powers," he added (*id.* at 36a):

> This intrusion by the Article III branch into the discretionary judgments of a coordinate branch is particularly sensitive in the context of reviewing litigation decisions by the Executive, where various considerations of policy, tactics and the allocation of limited resources require complex and delicate balancing.

He also noted (App., *infra*, 36a) that the statutory provision in question not only empowers the Attorney General to provide government legal representation for federal employees who are sued but also authorizes him "to bring legal actions, to intervene in actions, or to file amicus briefs in actions filed by [other parties]." Judge Starr observed (*id.* at 36a n.3) that "the panel [did] not offer any rationale limiting judicial review of actions by the Attorney General under section 517 to decisions to represent government employees."

REASONS FOR GRANTING THE PETITION

This case presents questions of great importance with respect to judicial review of discretionary government decisions under the Administrative Procedure Act, 5 U.S.C. 701-706. Although the APA does not authorize judicial review of actions "committed to agency discretion by law" (5 U.S.C. 701(a)(2)), the Untied States Court of Appeals for the District of Columbia Circuit appears to be in the process of reading this ex-

ception out of the law, so that even the government's litigation decisions—paradigm examples of actions hitherto regarded as purely discretionary—have been held subject to review. In *Chaney* v. *Heckler*, 718 F.2d 1174 (D.C. Cir. 1983), petition for cert. pending, No. 83-1878, the court held that the Food and Drug Administration's decision not to undertake investigative or enforcement action regarding the use of lethal injections to administer death sentences was subject to judicial review. On the same day, the court in this case reached the startling and wholly unprecedented conclusion that the Justice Department's decision not to provide legal representation for a federal employee sued in her individual capacity was likewise reviewable under the APA. These decisions in themselves are harmful to important government interests. More important, they are symptomatic of the District of Columbia Circuit's erroenous approach to the question of the reviewability of purely discretionary executive decisions, a question that deeply implicates the doctrine of separation of powers. Equally extreme results may be expected as long as that approach remains uncorrected. This is obviously a matter of great importance, and affects all of those government agencies whose discretionary actions may be reviewed in the District of Columbia Circuit.

Consideration of this case together with *Chaney* will, we believe, assist the Court in assessing whether the lower courts have correctly understood and applied the doctrine of nonreviewability of purely discretionary executive decisions. *Chaney* and this case each throw a different sort of light on the problem. *Chaney* relates to the implementation of an administrative enforcement program, while this case involves the classical executive function of determining whether the government should participate in litigation.[5]

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[5] *Chaney* also involves other substantial questions and, accordingly, may be decided on other grounds if review is granted.

1. The court of appeals' decision allowing judicial review under the Administrative Procedure Act (5 U.S.C. 701-706) of the government's refusal to furnish legal representation for a federal employee sued in her individual capacity is clearly wrong.[6] Under the APA, 5 U.S.C. 701(a)(2), final agency action is not subject to judicial review if it is "committed to agency discretion by law." This bar to judicial review applies where the governing "'statutes are drawn in such broad terms that in a given case there is no law to apply.'" *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 410 (1971) (quoting S. Rep. 752, 79th Cong., 1st Sess. 26 (1945)). In making this determination, "the ultimate analysis is always one of Congress's intent" (*Southern Ry.* v. *Seaboard Allied Milling Corp.*, 442 U.S. 444, 454 (1979). See also *Barlow* v. *Collins*, 397 U.S. 159, 166 (1970); *Schilling* v. *Rogers*, 363 U.S. 666, 674 (1960). Cf. *Block* v. *Community Nutrition Institute*, No. 83-458 (June 4, 1984).

Like *Chaney*, this is a case in which Congress has provided "'no law to apply'" and clearly did not intend to authorize judicial review. Under 28 U.S.C. 517, the Attorney General is authorized to send any officer of the Department of Justice "to attend to the interests of the United States" in any suit pending in federal or state court. Other federal statutes (28 U.S.C. 516, 519) vest the Attorney General with the authority to conduct and supervise litigation in which a federal officer is a defendant. None of these statutes, however, contains

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[6] This case is limited to the question of review under the APA, which permits agency action to be set aside if it is "arbitrary, capricious, [or] an abuse of discretion" (5 U.S.C. 706(2)(A)). As illustrated by respondent's second claim against the EEOC under Title VII of the Civil Rights Act of 1964, 42 U.S.C. (& Supp. V) 2000e *et seq.* (see App., *infra*, 19a-21a), an employee may contest the denial of representation on grounds of race, color, religion, sex, or national origin. 42 U.S.C. (& Supp. V) 2000e-16.

the slightest hint that Congress intended to confer upon individuals, such as respondent, the right to contest the Attorney General's exercise of this authority. Moreover, all of the statutes are "written in the language of permission and discretion" (*Southern Ry.* v. *Seaboard Allied Milling Corp.*, 442 U.S. at 455). No statute requires the Attorney General to provide legal representation for every—or indeed for any—federal employee who is sued in his individual capacity. Nor does any statute provide standards for determining when such representation should be furnished, other than the direction in 28 U.S.C. 517 that the Attorney General should "attend to the interests of the United States." "[T]he permissive terms in which [these] provisions are drawn * * * persuasively indicate that their administration was committed entirely to the discretionary judgment of the Executive branch 'without the intervention of the courts'" (*Schilling* v. *Rogers*, 363 U.S. at 674, quoting *Work* v. *Rives*, 267 U.S. 175, 182 (1925)).

It is also significant that these are not narrow statutes dealing solely with the provision of legal representation for federal employees who are sued. Instead, they are the same provisions that confer upon the Attorney General the broad authority to conduct the government's litigation. As Judge Starr observed (App., *infra*, 36a), it is upon these provisions that the Attorney General must rely when he decides "to bring legal actions, to intervene in actions, or to file amicus briefs in actions filed by parties other than the United States in courts around the nation." If Congress did not intend to authorize judicial review of the latter decisions—and any such suggestion would be truly revolutionary—it seems quite unlikely that Congress meant to permit judicial review of the decision involved in this case, which was taken under the identical statutory authority.

The purpose and origins of these statutory provisions provide further persuasive proof that Congress never intended to authorize judicial review. As this Court has stated (*Buckley* v. *Valeo*, 424 U.S. 1, 138 (1976)): "[a]

lawsuit is the ultimate remedy for a breach of the law, and it is to the President * * * that the Constitution entrusts the responsibility to 'take Care that the Laws be faithfully executed.' Art. II, § 3." In the first Judiciary Act, the authority to litigate on behalf of the United States was delegated to the Attorney General and the United States Attorneys. Act of Sept. 24, 1789, ch. 20, § 35, 1 Stat. 92. In succeeding years, with the growth of government litigation, other officers in various departments were appointed to conduct suits for the government, and in many instances private attorneys were retained. See Cong. Globe, 41st Cong., 2nd Sess. 3035 (1870). The Department of Justice was created in 1870 to centralize all government litigation in one department under the Attorney General's direction (*ibid.*; Act of June 22, 1870, ch. 150, 16 Stat. 162). The statutes at issue here derive from Section 5 of that Act (16 Stat. 162).[7] Their purpose and effect was to delegate to the Attorney General and his appointees the re-

[7] Section 5 of the Act provided in pertinent part:

> [T]he Attorney General may, whenever he deems it for the interest of the United States, conduct and argue any case in which the government is interested, in any court of the United States, or may require the solicitor-general or any officer of his Department to do so. And the solicitor-general, or any officer of the Department of Justice, may be sent by the Attorney-General to any State or district in the United States to attend to the interests of the United States in any suit pending in any of the courts of the United States, or in the courts of any State, or to attend to any other interest of the United States.

This provision was codified as Rev. Stat. 361 and 367 (1874 ed.), which were later enacted in modified form as 5 U.S.C. (1940 ed.) 306 and 316 and still later as 28 U.S.C. 516 and 517. 28 U.S.C. 519 is of more recent origin. Act of June 25, 1948, ch. 646, § 507, 62 Stat. 910. The portion of that statute relevant here, which authorizes the Attorney General to "supervise" government litigation, overlaps 28 U.S.C. 507, which authorizes him to "conduct" such litigation. There is no indication whatsoever that this supervision was intended to be supervised in turn by the judiciary.

sponsibility, conferred upon the President in Article II, Section 3 of the Constitution, for conducting the government's litigation. Cong. Globe, 41st Cong. 2d Sess. 3035-3039, 3065-3067, 4490-4491 (1870). There is nothing in the language or the legislative history of these statutes that suggests that Congress wished to subject the exercise of that authority to court supervision.

Finally, as Judge Starr pointed out (App., *infra* 35a-36a), the doctrine of separation of powers reinforces the conclusion that Congress did not mean to authorize judicial review of the executive's litigation decisions. It is the responsibility of the courts to decide cases, not to judge whether the executive's decision whether or not to participate in litigation "make[s] sense" (*id.* at 22a n.16). Arrogation of such authority would cast the judiciary in conflicting dual roles. Just as the Constitution's system of checks and balances would be eroded if the executive undertook to adjudicate cases and controversies, the doctrine of separation of powers is infringed by judicial supervision of the government's decision whether or not to conduct litigation, either on its own behalf or at the behest of one of its employees. Because Congress legislates against the background of these fundamental constitutional postulates, a conclusion that Congress intended to authorize judicial review here should not be reached in the absence of a clear and explicit congressional command.

2. Even if it is assumed that "law to apply" may be found in an agency's regulations, as well as its governing statutes, the applicable policy guidelines in this case (28 C.F.R. 50.15) provide no workable standards under which decisions regarding representation could be reviewed by the courts. The policy statement establishes a few eligibility requirements for representation: the employee must "be sued, subpoenaed, [or] charged" in "civil [or] Congressional proceedings [or] in state criminal proceedings" (28 C.F.R. 50.15(a)), and the employee must not be a defendant in a related federal criminal case or the subject of a related federal criminal

investigation (28 C.F.R. 50.15(a)(4) to (6)). If these threshold requirements are met, the Department of Justice "may" provide representation when that is "in the interest of the United States" (28 C.F.R. 50.15(a)).[8] Determining whether something is "in the interest of the United States" seems a classic example of a decision "committed to agency discretion by law" and thus not subject to review under the APA.

At most, the policy statement suggests two broad criteria to be used in making representation decisions. First, representation by a government attorney may be precluded if there are conflicts between the legal and factual positions of employees in the same case. See 28 C.F.R. 50.15(a)(9).[9] Second, the government may decline to provide or pay for representation if the employee's legal position conflicts with the interests of the United States. See 28 C.F.R. 50.15(a)(7)(ii); 28 C.F.R. 50.16(a).

Neither of these criteria provides an appropriate basis for judicial review. If the government denied representation due to a conflict between employees, it would often be difficult for the government to explain its decision without disclosing confidential information furnished by one of the employees and protected by the attorney-client privilege. Similarly, if representation were withheld or terminated because the employee's legal position conflicted with broader government litigation strategy, the deliberative process and attorney-client privileges would make a full explanation difficult if not impossible. Sending government lawyers into court to represent federal employees who are sued in their individual capacities is not simply the provision of

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[8] It is noteworthy that neither the statute nor the regulations in any way use the language of "rights" or "entitlements"; they clearly do not contemplate giving the employee any sort of private "right" to be represented.

[9] In this situation, private counsel may be furnished at government expense, if funds are available. 28 C.F.R. 50.16(a).

an employment benefit, like sick leave or retirement pay. Rather, such representation is closely tied to the government's overall litigation strategy. For example, government attorneys, even when representing individual defendants, are not authorized to advance arguments that would be harmful to the government's broader interests. Thus, judicial review of the government's representation decisions will almost inevitably lead to court supervision over the details of the government's litigation decisions and strategy—matters entrusted squarely to the discretion of the executive and traditionally protected by privilege.

The court of appeals' intrusion in this case into one aspect of the government's discretionary decision-making in the area of litigation is matched by the court's intrusion in *Chaney*, where the court allowed judicial review of an agency's discretionary decision regarding the way in which its limited enforcement resources might best be employed. That the court's precedents have led to judicial review of even these purely discretionary determinations is a clear warning that the court's approach to the question of when review is appropriate has gone fundamentally awry. If the question at issue here—the correctness of the Attorney General's decision whether providing legal representation is or is not in the interest of the United States—is not a question "committed to agency discretion by law," it is hard to think of any case that could fall into that category.

3. Both *Chaney* and this case resulted from the court of appeals' effective abandonment of the legal standard prescribed in *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. at 410, *i.e.*, whether the governing "'statutes are drawn in such broad terms that in a given case there is no law to apply.'" By some strange chemistry, the District of Columbia Circuit has concluded that the search for "law to apply" should not focus upon the statutory language or even upon Con-

gress's intent as evidenced in the legislative history. Instead, the court consistently applies the following test:

> [t]he determination of whether there "is law to apply" turns on such *pragmatic considerations* as whether judicial supervision is necessary to safeguard plaintiffs' interests, whether judicial review will unnecessarily impede the agency in effectively carrying out its congressionally assigned role, and whether the issues are appropriate for judicial review.

Chaney v. *Heckler*, 718 F.2d at 1185 (emphasis added).[10] This formulation converts a question of statutory interpretation—whether Congress intended the courts to review an agency's enforcement decisions—into an essentially standardless, legislative decision—whether, in the court's judgment, such review would be beneficial. As Judge Scalia has aptly observed, this test means that the court is free to intervene whenever it "think[s] it a good idea." *Chaney* v. *Heckler*, 724 F.2d 1030, 1031 (D.C. Cir. 1984) (dissent from denial of rehearing). And the court of appeals apparently thinks that review is always a good idea, except perhaps in cases where it is "beyond [its] powers" to determine whether an agency's action "makes sense." We do not think that this is what Congress had in mind in enacting

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[10] See also App., *infra*, 21a n.16; *Investment Co. Institute* v. *FDIC*, 728 F.2d 518, 526 & n.6 (D.C. Cir. 1984) (majority of panel expresses "discomfort with the test" to which circuit is bound); *American Friends Service Committee* v. *Webster*, 720 F.2d 29, 39-45 & nn.10, 13 (D.C. Cir. 1983) (literal application of *Overton Park* test provides "limited guidance"; must be supplemented by "more pragmatic analysis"); *Local 1219, American Fed'n of Gov't Employees* v. *Donovan*, 683 F.2d 511, 515 (D.C. Cir. 1982); *Natural Resources Defense Counsel, Inc.* v. *SEC*, 606 F.2d 1031, 1044 (D.C. Cir. 1979).

the APA's review section, nor what this Court had in mind in announcing the *Overton Park* formulation.[11]

4. The court of appeals' decision in this case threatens important government interests. Even if confined to decisions regarding representation of federal employees, the decision will cause serious problems. The potential for burdensome and intrusive judicial review may lead to unsound decisions regarding representation. And, as noted, when decisions denying representation are challenged, the government may often have great difficulty in explaining its actions without disclosing sensitive, privileged materials.

There is also substantial danger that the court of appeals' decision may be extended beyond the narrow area of decisions denying representation at the outset of litigation. Under the court of appeals' reasoning, all of the following decisions, which are made under the same statutory authority and pursuant to the same policy guidelines, might also be held reviewable: a decision to provide government representation rather than paying for private counsel (or vice versa); a decision to terminate representation during trial; and a decision not to

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[11] Other courts of appeals adhere far more faithfully to the *Overton Park* standard. See, *e.g.*, *California* v. *Settle*, 708 F.2d 1380, 1382 (9th Cir. 1983) (review available only if plaintiff alleges violation of "constitutional, statutory, regulatory or other legal mandates or restrictions"); *Merrill Ditch-Liners, Inc.* v. *Pablo*, 670 F.2d 139 (9th Cir. 1982) (same); *Garcia* v. *Neagle*, 660 F.2d 983, 987-989 (4th Cir. 1981) (same), cert. denied, 454 U.S. 1153 (1982); *Jaymar-Ruby, Inc.* v. *FTC*, 651 F.2d 506, 511 (7th Cir. 1981) (no law to apply where "Congress did not specify any statutory criteria"); *Board of Trade* v. *CFTC*, 605 F.2d 1016 (7th Cir. 1979) (concluding that judicial review unavailable based on statutory language, structure, purpose, and legislative history), cert. denied, 446 U.S. 928 (1980). Cf. *Hondros* v. *United States Civil Service Comm'n*, 720 F.2d 278, 292-293 (3d Cir. 1983). But see *Colon* v. *Carter*, 633 F.2d 964, 966-967 (1st Cir.1980).

appeal or seek appellate review of an adverse decision. Furthermore, it is unsettling that the statutes involved in this case are the same ones under which the Department of Justice makes broader litigation decisions, such as whether to initiate suit, intervene in litigation, or participate as amicus curiae. See App., *infra*, 35a.

Most important however, is the legal standard consistently employed by the District of Columbia Circuit in determining whether executive decisions are exempt from court review under Section 701(a)(2) of the APA. As long as that standard remains uncorrected, unjustified judicial intrusion into purely discretionary executive decisions will result. *Chaney* and this case are not aberrations; they are the logical product of the court of appeals' erroneous legal standard and the court's apparent preference, on policy grounds, for almost universal judicial supervision of how the Executive Branch exercises its discretion.

5. Even if the Department of Justice's decision not to provide legal representation was reviewable under the APA, it most certainly was not arbitrary and capricious, as the court of appeals held. The nature and scope of the review conducted by the court of appeals in this case is important in itself; it also warrants review because it will illuminate the issue of reviewability by casting light on the problems that review of government litigation decisions will inevitably entail.

a. The Department provided three sound reasons for its decision not to provide representation for respondent. First, the government properly cited (see App., *infra*, 12a) "'the clearly personal nature of the dispute between [respondent] and Mr. Perry.'" As our statement shows (pages 2-4, *supra*), respondent and Perry, two federal employees, engaged in bitter, highly personal, and lengthy litigation. For attorneys employed or paid by the government to have espoused the cause of one or both would have been most unseemly. The

government has far better uses for its limited litigation resources than to expend them by intervening in protracted and pointless personal feuds.

Second, the government noted (see App., *infra*, 12a) that the lawsuit in which respondent sought representation arose out of conduct that violated an EEOC directive. The court of appeals correctly observed (*id.* at 23a-24a) that the government has sometimes provided *private* counsel for officials despite the fact that they were under government investigation.[12] Nevertheless, the government is surely entitled to take the nature of the official's conduct into account in deciding how to employ its limited litigation resources. Officials believed to have acted properly or in good faith are obviously more deserving of representation than those who flout the government's own rules and then turn to the government for help.

Finally, the government pointed out (see App., *infra*, 12a) that *Perry* v. *Falkowski*, *supra*, substantially overlapped separate actions in which respondent and Perry were contesting the EEOC's attempt to discharge them because of the taping incident. The existence of the latter suits would have created a serious conflict of interest for any government attorney assigned to represent respondent. As a practical matter, it would have been virtually impossible for any government attorney to represent her. The court of appeals itself observed (App., *infra*, 17a n.14) in discussing respondent's claim that EEOC attorneys provided her with inadequate representation in *Perry* v. *Golub*, *supra*: "As adverse parties in related litigation arising out of the same underlying dispute, the Commission * * * [and respondent] could not be adequately represented by the same counsel as a matter of law." See

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[12] In that situation, government representation is not permitted. 28 C.F.R. 50.15(a)(6). See 28 C.F.R. 50.16(a).

also App, *infra*, 20a n.15 ("EEOC attorneys were ethically bound not to represent [respondent] in the *Perry* v. *Falkowski* suit" because "[t]he agency * * * had interests adverse to [respondent] in related litigation arising out of the same underlying dispute").

Private counsel could have been provided for respondent at government expense, but funds for that purpose are severely limited (see 28 C.F.R. 50.16(a)). Moreover, due to the overlapping nature of *Perry* v. *Falkowski*, *supra*, and the suit regarding respondent's discharge, furnishing repesentation to respondent would have effectively subsidized her litigation against the EEOC. In deciding how to allocate its limited litigation resources, the government may seek to prevent the use of its funds to thwart government actions.

b. Although the court of appeals suggested (App., *infra*, 22a n.16) that judicial review of government representation decisions will not greatly interfere with the government's exercise of discretion, the court's decision in this case shows that in fact it is prepared to engage in an intensive and exacting form of scrutiny. Here, the court did not consider the cumulative weight of the government's three reasons for denying representation but instead considered each reason in isolation. Moreover, the court found nothing improper about two of the reasons—the personal nature of respondent's dispute with Perry and respondent's violation of an EEOC rule in taping their conversation. However, the court concluded—apparently based on an extra-record review of the government's conduct of similar suits during the past decade—that the government had not always applied these criteria (*id.* at 23a-24a) and had afforded respondent disparate treatment (*id.* at 25a-26a). Finally, although the government's third reason for withholding representation—respondent's and Perry's overlapping suits against the EEOC—was entirely proper, the court assumed that the government was actually claim-

ing the right to deny repesentation as retaliation. The court's grudging construction and detailed disagreement with the government's reasons for its decision in this case suggest that future representation decisions will be intensively reviewed.

The court's review of the government's decision in this case is particularly disturbing because the public record bearing on that decision was unusually detailed, due to the long and public dispute between respondent and Perry. In other cases, the attorney-client, work product, and deliberative process privileges will frequently protect much of the information relating to the government's decision. In our judgment, if there is to be any judicial review under the APA of the government's representation decisions, the courts must take into account the sensitive and often privileged nature of much of the explanatory information. In any event, under no appropriate standard of review can the government's decision in this case be characterized as arbitrary or capricious.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JUNE 1984

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 82-1446

EVELYN FALKOWSKI, APPELLANT

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.

Appeal from the United States District Court
for the District of Columbia
(D.C. Civil No. 81-01776)

Decided October 14, 1983

John D. Grad, with whom *Owen E. Perry* was on the brief, for appellant.

R. Lawrence Dessem, Attorney, Department of Justice, with whom *Stanley S. Harris*, United States Attorney, *Barbara L. Herwig*, Attorney, Department of Justice, and *Vella M. Fink*, Attorney, Equal Employment Opportunity Commission, were on the brief, for appellees. *Anthony J. Steinmeyer*, Attorney, Department of Justice, also entered an appearance for appellees.

Before ROBINSON, *Chief Judge*, WILKEY, *Circuit Judge*, and MCGOWAN, *Senior Circuit Judge*.

Opinion for the Court filed by *Senior Circuit Judge* MCGOWAN.

MCGOWAN, *Senior Circuit Judge:* This appeal is from the District Court's grant of summary judgment against plaintiff Evelyn Falkowski, a high-level career

employee of the Equal Employment Opportunity Commission (EEOC or Commission). In her complaint, Ms. Falkowski sought a judgment against the Commission and the Department of Justice (DOJ or Department) compelling them to reimburse her for past legal expenses and to provide future legal representation in two lawsuits brought against her by a subordinate during her tenure as director of EEOC's district office in Birmingham, Alabama. Plaintiff alleges that the defendant government agencies have denied her reimbursement and representation in these suits either for discriminatory and retaliatory motives in contravention of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-16 (1976 & Supp. V 1981), or through arbitrary and capricious agency action in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (1976).

After Ms. Falkowski filed her complaint in District Court, the defendant government agencies moved in the alternative for dismissal or summary judgment. Although it found that the complaint stated valid causes of action under Title VII and the APA, the District Court nonetheless granted defendants' motion for summary judgment. *See Falkowski* v. *EEOC*, No. 81-1776 (D.D.C. Mar. 4, 1982). Plaintiff thereafter filed this appeal challenging the District Court's grant of summary judgment on three of her causes of action. We affirm the District Court's judgment as to plaintiff's first cause of action, but reverse as to the second and third because genuine issues of material fact relevant to those claims remain in the case.

I

The history of Ms. Falkowski's struggles with the EEOC stretches back to 1973 and encompasses an intervening volume of courtroom litigation and agency proceedings that for sheer sinuosity falls nothing short of Kafkaesque. Fortunately for purposes of the present opinion, we need recount only a portion of the various

judicial and administrative antecedents to the case now before us.

A. *The Background Litigation for Which Plaintiff Seeks Government Representation and Reimbursement*

Ms. Falkowski began her career with the EEOC in 1967 and by 1971 had become head of the Commission's newly formed office in Jackson, Mississippi. At the time, she was one of the few women professionals employed by EEOC in its southeastern region. After two years in the Jackson office, Ms. Falkowski sought a transfer to the Birmingham district office for both personal and professional reasons. When repeated attempts to procure her transfer failed, she brought suit against the EEOC alleging sexual discrimination as the motive for the agency's inaction. The matter was settled in apparently amicable fashion in the fall of 1974 when the Commission agreed to appoint Ms. Falkowski director of the Birmingham office. *See Falkowski* v. *Powell*, No. 73-P-1009-S (N.D. Ala. Sept. 9, 1974) (consent decree).

1. *The Perry v.* Golub *Litigation*

Following Ms. Falkowski's arrival in the Birmingham office, a series of disputes broke out between her and number of her subordinates, but principally with the office's deputy director, Bertram Perry. On his side, Mr. Perry alleged that the friction stemmed from his justified protests against mismanagement by Ms. Falkowski; in particular, he pointed to a series of procedural irregularities purportedly reflecting overzealousness and bias on her part in favor of plaintiffs in certain Title VII actions. *See Perry* v. *Golub*, 400 F. Supp. 409, 411-12 (N.D. Ala. 1975), *vacated as moot*, 594 F.2d 862 (5th Cir. 1979). On her side, Ms. Falkowski contended that the conflict arose from her attempts to discipline rank

insubordination and oppressive behavior against office personnel by Mr. Perry. *See* Brief for Appellant at 8.[1]

As the conflict deepened, both parties began to seek support for their respective positions from superiors in the Atlanta regional office. A series of investigations ensued that resulted in EEOC's decision, first to suspend Ms. Falkowski's authority as district director, and then to transfer both parties out of the Birmingham office. Ms. Falkowski immediately presented a pleading in federal district court challenging her transfer as a violation of the 1974 consent decree.[2]

Mr. Perry likewise brought suit in federal district court to enjoin his own transfer out of Birmingham. His complaint named Ms. Falkowski and two other superiors, Messrs. Golub and Hollowell, as defendants. *See Perry* v. *Golub*, 400 F. Supp. 409 (N.D. Ala. 1975), *vacated as moot*, 594 F.2d 862 (5th Cir. 1979). Alleging that the transfer violated his first amendment and other civil rights, Mr. Perry accused his EEOC superiors of attempting to silence his protests as a "whistleblower" and of discriminating against him on account of his race, which is black. These steps marked the beginning of the *Perry* v. *Golub* litigation, the first of the two suits for which plaintiff-appellant today seeks reim-

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[1] This court expresses no opinion on the merits of these contentions and notes that apparently no other court or agency has ever ruled definitively on them either. *See* Perry *v.* Falkowski, No. 78-PT-0935-S, slip op. at 2 (N.D. Ala. Apr. 17, 1981) (unpublished opinion granting plaintiff's motion for voluntary dismissal).

[2] Just prior to making this pleading, Ms. Falkowski had filed two administrative charges of employment discrimination against EEOC. In these charges, she alleged that the agency was undermining her authority in retaliation for her earlier suit against the Commission and because her predominantly black male superiors in Atlanta did not wish to see a white female in the Birmingham district-director post. *See* Appendix at 162-63 (reproducing charges of July 9, 1975, and August 15, 1975).

bursement and representation from the government in this court.

On August 29, 1975, the United States District Court for the Northern District of Alabama acted on Mr. Perry's complaint. A hearing was held in which EEOC attorneys appeared on behalf of all three defendants, including Ms. Falkowski, and in which private counsel for Ms. Falkowski was also present. At the hearing's conclusion, the district judge granted Mr. Perry's motion for a preliminary injunction barring his transfer from the Birmingham office. Under an informal agreement with the EEOC, Ms. Falkowski was allowed to "tag" along" on this injunction, thus suspending her transfer as well. As a result of this agreement, the district court agreed to take no action on Ms. Falkowski's separate pleading for relief under the earlier 1974 consent decree.[3]

The next relevant action in *Perry* v. *Golub* came in November 1976 when the district court granted Mr. Perry's motion to drop Ms. Falkowski as a defendant in the action. At roughly the same time, the court also acted to dissolve its preliminary injunction on grounds that efforts to remove Mr. Perry from his post were no longer afoot. Ms. Falkowski thereafter appealed her dismissal from the case, contending that EEOC attorneys had inadequately defended her in the 1975 preliminary-injunction hearing, and that she wished to remain in the action to clear her name. The United States Court of Appeals for the Fifth Circuit affirmed the district court's dissolution of the injunction on grounds of

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[3] See Falkowski *v.* Perry, No. 76-G-0545-S, slip op. at 3 (N.D. Ala. Feb. 13, 1981) (unpublished opinion granting in part plaintiff's petition for costs and attorneys' fees), *aff'd*, No. 81-7278 (11th Cir. Oct. 25, 1982), *cert. denied*, 52 U.S.L.W. 3257 (U.S. Oct. 3, 1983).

mootness,[4] and in an apparent nod to Ms. Falkowski vacated the underlying proceedings "so as to spawn no consequences." *Perry* v. *Golub*, 594 F.2d 862 (5th Cir. 1979) (No. 77-1719) (unpublished opinion).[5]

Numerous other controversies have emerged in the *Perry* v. *Golub* litigation since that time, including a dispute over the district court's retention of jurisdiction in the case after 1976[6] and a petition by Mr. Perry for costs and attorneys' fees.[7] Ms. Falkowski meanwhile had instituted parallel litigation of her own against EEOC superiors which has followed an equally labyrin-

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[4] The Fifth Circuit apparently mistook Ms. Falkowski's appeal of her dismissal from the case as an appeal of the district court's decision to dissolve the injunction. *See* Perry *v.* Golub, 25 Empl. Prac. Dec. (CCH) ¶ 31,488, at 18,936-38 (N.D. Ala. 1980) (noting on remand that the appellate court confused the issues before it on appeal), *vacated and remanded*, No. 81-7278 (11th Cir. Oct. 25, 1982). Once rendered, however, the Fifth Circuit's ruling became the law of the case. *See* Perry *v.* Golub, No. 81-7278, slip op. at 2-3 (11th Cir. Oct. 25, 1982) (Fifth Circuit precedent held case moot after May 1976 despite district court's opinion to the contrary and intervening transfer of appellate jurisdiction to the newly formed Eleventh Circuit).

[5] The court of appeals' "nod" was merely in recognition of the preliminary nature of the district court's factual findings and not in support of Ms. Falkowski's other allegations. At the 1975 preliminary-injunction hearing, the district court made numerous findings of fact suggesting improper conduct on Ms. Falkowski's part. *See* Perry *v.* Golub, 400 F. Supp. 409, 411-15 (N.D. Ala. 1975), *vacated as moot*, 594 F.2d 862 (5th Cir. 1979). The Fifth Circuit evidently felt it unfair to leave these preliminary findings on the record absent the opportunity for a full hearing on the merits.

[6] Perry *v.* Golub, 464 F. Supp. 1016 (N.D. Ala. 1978), *vacated as moot*, 599 F.2d 1052 (5th Cir. 1979). *See also supra* note 4.

[7] *See* Perry *v.* Golub, 25 Empl. Prac. Dec. (CCH) ¶ 31,488 (N.D. Ala. 1980) (granting plaintiff's petition for costs and attorneys' fees), *aff'd in part and vacated and remanded in part*, No. 81-7278 (11th Cir. Oct. 25, 1982).

thine procedural course.[8] The details of these other proceedings, however, are not immediately relevant to the case before us.

2. *The* Perry *v.* Falkowski *Litigation*

During the pendency of the *Perry* v. *Golub* litigation, Ms. Falkowski and Mr. Perry remained together in the Birmingham office on terms that few would describe as cordial. In an attempt to gather evidence corroborating her charges of continuing insubordination by Mr. Perry, Ms. Falkowski secretly recorded a confrontation with him that occurred in her office on July 18, 1977. Besides insubordination, the recording revealed a regrettable stream of obscenities and racial epithets on Mr. Perry's part. *See* Appendix at 11-19 (transcript of tape recording). What Ms. Falkowski's conduct might have been in the absence of a recording device known only to himself, one can only conjecture. The incident served to underscore, however, the depths to which professional relationships and behavior had sunk in the Birmingham office by mid-1977.

On the basis of the tape-recording incident, the EEOC moved to terminate both Mr. Perry and Ms. Falkowski from its employ. The Commission justified its action in Mr. Perry's case on the basis of the tape's content. In Ms. Falkowski's case, the Commission found that she had violated an internal agency order prohibiting nonconsensual recording of official conver-

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[8] *See, e.g.*, Falkowski *v.* Perry, No. 76-G-0545-S (N.D. Ala. Feb. 13, 1981) (unpublished opinion granting in part plaintiff's petition for costs and attorneys' *fees*), *aff'd*, No. 81-7278 (11th Cir. Oct. 25, 1982), *cert. denied*, 52 U.S.L.W. 3257 (U.S. Oct. 3, 1983); Falkowski *v.* Perry, 464 F. Supp. 1016 (N.D. Ala. 1978), *vacated as moot*, 599 F.2d 1051 (5th Cir. 1979), *cert. denied*, 446 U.S. 936 (1980).

sations by agency personnel. *See Perry* v. *Golub*, 464 F. Supp. at 1019 & n.2 (citing EEOC Order No. 165).[9]

Provoked by Ms. Falkowski's ruse and disturbed by the resulting personel action. Mr. Perry filed suit in 1978 in federal district court against Ms. Falkowski and EEOC chairwoman Eleanor Norton. The complaint sought a declaratory judgment that Mr. Perry's constitutional and statutory rights had been violated, and prayed for compensatory and punitive damages totalling over five million dollars. This step commenced the *Perry* v. *Falkowski* litigation, the second suit for which plaintiff-appellant today seeks reimbursement and representation from the government in this Court.

Action on Mr. Perry's complaint was delayed until 1981, when the district court granted his request for voluntary dismissal. *See Perry* v. *Falkowski*, No. CV78-PT-0935-S (N.D. Ala. Apr. 17, 1981) (unpublished opinion). At the same time, Ms. Falkowski moved for leave to file counterclaims for defamation and other charges against Mr. Perry, but the district court denied her motion. *Id.* Ms. Falkowski then filed a petition for costs and attorneys' fees as a prevailing defendant against Mr. Perry. The district court denied this petition as well, and the Eleventh Circuit affirmed the decision on appeal. Ms. Falkowski's petition for certiorari on this last issue has recently been denied by the United States Supreme Court. *See Perry* v. *Falkowski*, No. CV78-PT-0935-S (N.D. Ala. July 22, 1981) (unpublished opinion denying defendant's petition for costs and attorneys fees), *aff'd*, No. 81-7643 (11th Cir. Oct. 25, 1982), *cert. denied*, 52 U.S.L.W. 3257 (U.S. Oct. 3, 1983).

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[9] Although EEOC later abandoned its efforts to discharge Ms. Falkowski and Mr. Perry, it did succeed in having them permanently transferred out of the Birmingham office.

B. *Plaintiff's Efforts to Secure Government Representation and Reimbursement*

Of greater relevance to the present appeal have been Ms. Falkowski's earlier, unsuccessful attempts to secure representation by government counsel, or, in the alternative, reimbursement for her expenses in hiring private counsel, in the *Perry* v. *Golub* and *Perry* v. *Falkowski* litigations. Since late 1976, EEOC attorneys have apparently never undertaken to represent Ms. Falkowski in any of the proceedings in either case, even though government counsel has been provided to each of her codefendants. To date, Ms. Falkowski has amassed substantial legal bills conducting her own defense with private attorneys in these cases.

1. *Plaintiff's Efforts to Secure Representation and Reimbursement in* Perry *v.* Golub

Prior to the filing of Mr. Perry's complaint in *Perry* v. *Golub* in late August 1975, Ms. Falkowski had already filed two charges of employment discrimination against EEOC and her immediate supervisors in Atlanta. *See* Appendix at 162-63 (reproducing charges of July 9, 1975, and August 15, 1975). These charges alleged that the agency and her superiors were undermining her authority by granting preferential treatment to a black male subordinate (presumably Mr. Perry) and by failing to support her in efforts to control insubordination on his part. The charges recited sex and race discrimination, as well as retaliation for her earlier 1973 suit, as the motives for the agency's conduct.

On December 12, 1976, over eighteen months later, Ms. Falkowski filed an amendment to these earlier charges with the then acting chairwoman of EEOC, Ethel Walsh. *See* Appendix at 168-69 (Memorandum from Evelyn Falkowski to Ethel Walsh (Decmeber 12, 1976)). Although nowhere in her statement did Ms.

Falkowski request representation or reimbursement from the agency, she did in somewhat oblique terms challenge the quality of her representation by EEOC attorneys in the *Perry* v. *Golub* litigation. The amendment alleged, for example, that she had been "prejudiced before a Federal District judge," apparently by agency counsel's failure to rebut unsubstantiated charges and perjured testimony introduced against her (again, presumably by Mr. Perry) in the case. *Id.*

Without entering into excruciating detail on this point, suffice it to say that at every turn in the ensuing administrative complaint and appeals process, arising out of not only these incidents but others as well, Ms. Falkowski continued to assert that EEOC for discriminatory and retaliatory reasons had failed to provide her with an adequate defense in the *Perry* v. *Golub* litigation. *See, e.g.*, Appendix at 178-79, 184-85, 189-90, 197, 202, 205, 281. Although in the context of these administrative proceedings she never raised a specific claim for representation or reimbursement linked to her charges of inadequate defense, we are willing to assume for purposes of the present appeal that the goal of her complaints was to secure agency legal assistance in clearing her name, promotions and retroactive raises denied her because of damage to her reputation, and finally some form of restitution for the legal expenses she incurred in carrying on her own defense with private counsel.

2. *Plaintiff's Efforts to Secure Representation and Reimbursement in* Perry *v.* Falkowski

Ms. Falkowski's efforts to secure government legal representation and reimbursement have been more explicit in the case of the *Perry* v. *Falkowski* litigation. Mr. Perry filed his initial complaint in that case on August 24, 1978. His suit was against Ms. Falkowski for secretly taping his outburst one year before and against EEOC chairwoman Norton for attempting to discharge

him based on the tape's content. *See* Appendix at 108-10 (reproducing Mr. Perry's complaint). Although EEOC attorneys defended Ms. Norton in that action, they provided no defense for Ms. Falkowski at all.

After learning that EEOC attorneys would not defend her, Ms. Falkowski immediately requested that the Commission secure Department of Justice representation for her. What ensued was an episode of bureaucratic red tape and temporizing that did not end until May of the following year when DOJ finally denied Ms. Falkowski's request. *See* Appendix at 101-03 (declaration of John Seibert, Assistant Director of Federal Programs Branch, DOJ Civil Division).

Frustrated by the delay with which her request was being processed, Ms. Falkowski consulted with an EEO counselor at the Commission on November 20, 1978, and filed a corresponding administrative complaint one month later on December 19th. *See* Appendix at 189-90, 24, 281. In her interview and complaint, she charged that EEOC was continuing to discriminate and retaliate against her by, in effect, denying her legal defense in the *Perry* v. *Falkowski* suit. She demanded that appropriate representation be provided immediately. The counselor's report quoted EEOC legal counsel as saying that the Commission could not provide legal defense for Ms. Falkowski and that the matter had been forwarded to the Department of Justice for handling. *Id.* at 190 (Counselor's Survey of December 6, 1978).[10]

The reasons for the delay in processing Ms. Falkowski's request for counsel appear to have been multiple. First, no one informed her that she had to submit her

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[10] The EEOC took final action on Ms. Falkowski's administrative complaint two years later, when it cancelled the complaint based on the District Court's decision in the case presently before us. *See* Appendix at 281-82 (Letter from Gilbert Sandate to Evelyn Falkowski (March 24, 1982)).

petition directly to the Department of Justice rather than to her immediate employing agency, EEOC. Second, despite repeated requests from DOJ, EEOC failed to certify in writing that Ms. Falkowski had been acting within the scope of her official duties when she recorded her conversation with Mr. Perry the year before. That certification did not come until December 20, 1978. Finally, between that date and May of the following year, the Department of Justice simply failed to act on Ms. Falkowski's request. By that point, of course, the request had been transformed from one for representation only into one for representation and reimbursement, since the deadline for filing an answer to the *Perry* v. *Falkowski* complaint had already long since passed and Ms. Falkowski had had no choice but to utilize private counsel of her own.

Finally, on May 17, 1979, Assistant Attorney General Barbara Babcock wrote to EEOC and Ms. Falkowski to deny the request for representation and reimbursement in connection with the *Perry* v. *Falkowski* suit. Her letter gave the reason for the Department's action as follows:

> In light of the clearly personal nature of the dispute between Ms. Falkowski and Mr. Perry giving rise to the litigation, the tape recording by Ms. Falkowski of Mr. Perry's remarks in contravention of an internal EEOC directive, and the existence of separate actions by Ms. Falkowski and Mr. Perry challenging proposed personnel actions against them, I do not believe it is in the interest of the United States to reimburse Ms. Falkowski for her legal costs. Accordingly, pursuant to 28 C.F.R. § 50.15 (a)(2), I am denying Ms. Falkowski's request.

Appendix at 116. Following this denial, Ms. Falkowski asked the Department several times to reconsider its action, but each time DOJ acted to reaffirm its earlier decision.

II

Following these twists and turns in the federal courts of Alabama and Georgia and before the various administrative agencies here in Washington, Ms. Falkowski finally filed suit against EEOC and DOJ in United States District Court for the District of Columbia. In her complaint, she alleged three statutory causes of action: (1) one against EEOC under Title VII for discriminatory and retaliatory denial of adequate government legal representation in *Perry* v. *Golub*, (2) another against EEOC under Title VII for its actions in the *Perry* v. *Falkowski* litigation, and (3) a final cause of action under the APA against the Department of Justice for arbitrary and capricious denial of government legal representation in *Perry* v. *Falkowski*.[11] *See* Brief for Appellant at 15-16; *infra* note 12.

Before filing an answer, the defendant government agencies moved in the alternative for dismissal or summary judgment. The District Court, in an unpublished opinion, granted the defendants' motion for summary judgment on all three statutory claims.[12]

As to the first cause of action, the District Court ruled that EEOC attorneys had actually represented Ms. Falkowski in the *Perry* v. *Golub* litigation, and

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[11] The Administrative Procedure Act, of course, does not confer independent subject matter jurisdiction on federal district courts to review federal agency action. Califano *v.* Sanders, 430 U.S. 99, 105 (1977). Rather, such jurisdiction is based on general federal question jurisdiction under 28 U.S.C. § 1331 (Supp. V 1981). The APA merely provides the appropriate scope of review, once jurisdiction is otherwise available.

[12] Ms. Falkowski also alleged several constitutional causes of action under the first and fifth amendments which the District Court dismissed outright. *See* Falkowski *v.* EEOC, No. 81-1776, slip op. at 1-2 (D.D.C. Mar. 4, 1982). Plaintiff, however, has chosen not to appeal the dismissal of these claims. *See* Brief for Appellant at 15-16.

that she therefore had no claim against the Commission for denial of legal counsel in that case. *See Falkowski* v. *EEOC*, No. 81-1776, slip op. at 1 n.1 (D.D.C. Mar. 4, 1982). In the alternative, the District Court held that, even if Ms. Falkowski did have such a claim, it was time-barred by her failure to file a formal administrative complaint with the EEOC within thirty days after the claim arose. *Id.* (citing 29 C.F.R. § 1613.214(a)(1)(i) (1980)).

On Ms. Falkowski's second cause of action, the District Court noted that EEOC lacks authority to appoint or reimburse private legal counsel to defend agency personnel, and that the Commission's power is therefore limited to recommending such action to the Department of Justice. *Id.* at 2 (citing 28 U.S.C. § 517 (1976) and 28 C.F.R. §§ 50.15-50.16 (1980)). Because EEOC did recommend that DOJ reimburse Ms. Falkowski for her private legal expenses in *Perry* v. *Falkowski*, the District Court held that she had no claim against the Commission under Title VII for denial of legal counsel in that case either. Although Ms. Falkowski contended that the EEOC recommendations had been pretextual, the District Court noted that she had presented "no admissible evidence" to support this point, and had therefore failed to establish a prima facie case. *Id.*

Finally, as to the third cause of action, the District Court concluded that the Department of Justice had not acted arbitrarily or capriciously in denying Ms. Falkowski's request for government representation and reimbursement in *Perry* v. *Falkowski*. The court noted that the DOJ had considered Ms. Falkowski's request under the applicable statutes and regulations,[13] and had prop-

[13] The Attorney General has promulgated regulations governing the representation of federal employees by government-provided legal counsel in certain proceedings in which those employees are sued or subpoenaed in their individual capacity. *See*

erly denied it as not "in the interest of the United States" in accordance with 28 C.F.R. § 50.15(a)(2) (1979). As evidence that the Department's conclusion on this issue had not been arbitrary or capricious, the

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28 C.F.R. §§ 50.15-50.16 (1982). Statutory authority for the regulations is claimed under 28 U.S.C. §§ 516-517 (1976) (reserving conduct of litigation involving federal officers to the Attorney General and permitting him to send officers of the Department of Justice into court to attend to the interests of the United States).

In general, the regulations provide that federal employees may be provided legal representation at government expense if such representation is in the interests of the United States and the conduct for which the employee seeks representation was committed within the scope of his employment. *See* 28 C.F.R. § 50.15 (a) (1982). Unless it feels that representation is clearly unwarranted, the officer's employing agency is required to report to the Department of Justice whether the employee was acting within the scope of his employment, and whether the agency recommends representation in his case. *Id.* § 50.15 (a)(1). Under certain circumstances in which representation by DOJ attorneys would be ethically inappropriate, private counsel may be provided to the employee at government expense. *Id.* §§50.15 (a)(9)-(10), 50.16.

The Department takes the position that it will always provide representation for federal employees sued solely in their official capacity for equitable relief. *Id.* § 50.15(a)(1). *See also* United States Attorneys' Manual § 4-13.000 (1977). Employees sued in their individual capacity for money damages, however, must request representation through the procedures outlined above. So also, it appears, must employees who fall in between these two polar categories, e.g., employees sued in both their official and individual capacities for money damages and equitable relief. Ms. Falkowski fell into this latter intermediate category as a defendant in the *Perry* v. *Falkowski* suit.

The Attorney General's regulations were first published in the *Federal Register* on January 19, 1977, *see* Limitation for Representation of Federal Employees, 42 Fed. Reg. 5695 (1977), and later codified in the *Code of Federal Regulations*, *see* 28 C.F.R. §§ 50.15-50.16 (1977). Despite subsequent clarifying amendments, *see* 47 Fed. Reg. 8172 (1982), the regulations remain in substantially their original form.

District Court cited the three reasons spelled out in Assistant Attorney General Babcock's letter of May 17, 1979, quoted earlier in this opinion. *Falkowski* v. *EEOC*, slip op. at 2-3.

III

The issue before us on this appeal is whether the District Court moved too quickly in granting summary judgment because genuine issues of material fact remain in the case. Rule 56(c) of the Federal Rules of Civil Procedure governs this issue and provides that summary judgment shall issue only when the pleadings and other materials before the court establish "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Accordingly, summary judgment is inappropriate unless the moving party can establish that the evidence presented by the parties unequivocally resolves all relevant factual and legal issues in its own favor, and that this is so even though the evidence is viewed in the light most favorable to the party opposing the motion.

Because the defendant government agencies failed to meet this burden with respect to plaintiff's second and third causes of action, we hold that the District Court erred in granting summary judgment on those claims. In all other respects, we uphold the District Court's judgment, but modify certain of the grounds on which it based its ruling.

A. *Plaintiff's First Cause of Action*

The District Court ruled that Ms. Falkowski had no cause of action under Title VII against EEOC for denial of legal expenses in *Perry* v. *Golub* because EEOC attorneys had actually represented her in that case. *Falkowski* v. *EEOC*, slip op. at 1 n.1. In the alternative, the District Court held that, even if she did have such a claim, she had lost it by failing to file a formal adminis-

trative complaint with the Commission within thirty days after the claim arose. *Id.* Pretermitting the issue of whether Ms. Falkowski preserved her claim through timely administrative filing, we uphold the District Court on the first of the two grounds proposed.

In response to the District Court's ruling that EEOC attorneys actually represented her in the *Perry* v. *Golub* litigation, plaintiff argues that her claim goes, not to the fact of representation *vel non*, but to the adequacy of the representation that EEOC did provide. *See* Brief for Appellant at 23-27. Although we might otherwise be inclined to find merit in this position,[14] we hold that plaintiff is collaterally estopped from challenging the adequacy of her representation by EEOC attorneys in the *Perry* v. *Golub* suit.

In August 1980, Ms. Falkowski filed a petition for costs and attorneys' fees as a prevailing plaintiff in

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[14] It seems fairly clear that EEOC attorneys could not have provided Ms. Falkowski an adequate defense in *Perry* v. *Golub* because of the irreconcilable conflict of interest that existed between the agency and Ms. Falkowski in that case. On the very same day that EEOC superiors appeared as co-defendants with Ms. Falkowski in the *Perry* v. *Golub* preliminary-injunction hearing, she was bringing a motion against them and the agency in the same courthouse seeking to have her own transfer set aside as violative of the consent decree entered in her prior lawsuit against the agency. As adverse parties in related litigation arising out of the same underlying dispute, the Commission (in the persons of her superiors) and Ms. Falkowski could not be adequately represented by the same counsel as a matter of law, and it was highly improper for EEOC attorneys to undertake such dual representation. *See* United States Fidelity & Guar. Co. *v.* Louis A. Roser Co., 585 F.2d 932, 938-39 (8th Cir. 1978); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-15, DR 5-105 (1981).

These are arguments, however, that Ms. Falkowski should have presented in the Northern District of Alabama and the Eleventh Circuit, not in this court. *See infra* text following this note (discussing issue of collateral estoppel).

Falkowski v. *Perry*, her own action against EEOC superiors briefly discussed earlier in this opinion. *See supra* note 8 and accompanying text. In her petition, she requested costs and attorneys' fees against the Commission arising, not only out of that action, but also out of her defense of the *Perry* v. *Golub* suit. This somewhat unusual request was based on the theory that Ms. Falkowski and EEOC had been adverse co-defendants in the *Perry* v. *Golub* litigation, and that to the extent that EEOC had abandoned its attempts to transfer her involuntarily, she had prevailed over the agency.

To support the conclusion that EEOC had been an adverse co-defendant in *Perry* v. *Golub*, Ms. Falkowski pointed to the defense that EEOC attorneys had provided her in that action, and contended that that defense had been not only inadequate but a sham. *See Falkowski* v. *Perry*, No. 76-G-0545-S, slip op. at 15 (N.D. Ala. Feb. 13, 1981) (unpublished opinion granting in part plaintiff's petition for costs and attorneys' fees), *aff'd*, No. 81-7278 (11th Cir. Oct. 25, 1982), *cert. denied*, 52 U.S.L.W. 3257 (U.S. Oct. 3, 1983). In denying this portion of Ms. Falkowski's petition, the United States District Court for the Northern District of Alabama flatly rejected this line of argument, finding it "not substantiated by the facts." *Id.* at 16. *See also id.* at 18-19.

Under established principles of collateral estoppel, Ms. Falkowski is not now free to relitigate these same issues before this court. Even were we to disagree with the specific findings made by the district court in Alabama, plaintiff's remedy is not to be found in this forum but through direct appeal of the judgment of which those findings form an integral part.

Given that Ms. Falkowski is collaterally estopped from asserting a key element of her first cause of ac-

tion, the District Court's grant of summary judgment against her on that claim is accordingly affirmed.

B. *Plaintiff's Second Cause of Action*

Ms. Falkowski's second cause of action charged EEOC with discrimination and retaliation under Title VII arising out of the agency's handling of her request for government-provided legal counsel in *Perry* v. *Falkowski*. The District Court granted summary judgment on this claim because, to paraphrase the court's opinion, EEOC did all it could for Ms. Falkowski when it recommended that DOJ retain private legal counsel to represent her in the case. *Falkowski* v. *EEOC*, slip op. at 2. Although we agree with the District Court that EEOC lacks statutory authority to retain private counsel itself to defend agency officers in court,[15] the bare fact of for-

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[15] Section 516 of Title 28 provides that "[e]xcept as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, . . . is reserved to officers of the Department of Justice, under the direction of the Attorney General." 28 U.S.C. § 516 (1976). Although EEOC is authorized by law to send its own attorneys into court to represent the Commission, only EEOC attorneys appointed to regular federal service may act in this capacity. *See* 42 U.S.C. § 2000e-4(a), (b)(2) (1976 & Supp. V 1981). Accordingly, EEOC lacks statutory authority to hire private counsel to appear in court for any reason, not merely in cases involving agency officers as defendants.

Commission attorneys could not themselves represent Ms. Falkowski in the *Perry* v. *Falkowski* litigation because of actual conflicts of interest that existed between her and the agency throughout this period. At the time of the *Perry* v. *Falkowski* suit, Ms. Falkowski had already gone into court to challenge her own proposed discharge by the agency based on the same 1977 tape-recording incident that had given rise to Mr. Perry's lawsuit. *See* Falkowski *v.* Perry, No. 76-G-0545-S, slip op. at 3-6 (N.D. Ala. Feb. 13, 1981) (unpublished opinion granting in part plaintiff's petition for costs and attorneys' fees), *aff'd*, No. 81-7278 (11th Cir. Oct. 25, 1982), *cert. denied*, 52 U.S.L.W. 3257 (U.S. Oct. 3, 1983). The agency therefore had

mal Commission recommendation was not sufficient to support defendants' motion for summary judgment on this claim.

The relevant factual inquiry instead should have been whether EEOC acting out of discriminatory animus intentionally mishandled Ms. Falkowski's request so as to undercut the force of its formal recommendation on paper. This test admittedly places a heavy burden on plaintiff to show not only that the Commission acted out of legally proscribed motives, but also that its mishandling actually resulted in DOJ's final decision to deny her representation.

Viewing the evidence in the light most favorable to plaintiff, however, we are satisfied that the record reveals triable issues of fact on both of these points. The government does not contest, for example, that EEOC delayed for over three months in certifying that Ms. Falkowski had acted within the scope of her employment despite numerous requests for such certification from the Department of Justice. Although we express no opinion on the final resolution of this issue, it is certainly a reasonable inference that EEOC was wilfully dragging its feet because it did not wish government representation to be approved at all, or at least not in time to meet the Perry complaint. Moreover, a reasonable person might conclude that, once this lack of enthusiasm on the part of Ms. Falkowski's employing agency had been communicated to the Department of Justice, DOJ was unlikely to act favorably on her request for government-provided legal counsel.

Because the government failed to dispel these obvious inferences of illegal motivation and resulting harm

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interests adverse to Ms. Falkowski's in related litigation arising out of the same underlying dispute, and EEOC attorneys were ethically bound not to represent her in the *Perry* v. *Falkowski* suit. *See* United States Fidelity & Guar. Co. *v.* Louis A. Roser Co., 585 F.2d 932, 938-39 (8th Cir. 1978); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-15, DR 5-105 (1981).

that arise from the Commission's dilatory handling of Ms. Falkowski's request, we conclude that genuine issues of material fact remain with respect to her second cause of action. The District Court's grant of summary judgment on this claim is therefore reversed.

C. *Plaintiff's Third Cause of Action*

In her third cause of action, Ms. Falkowski cited the Department of Justice for arbitrary and capricious agency action in denying her request for government-provided legal counsel in *Perry* v. *Falkowski*. The District Court granted summary judgment on this claim because it found that the Department had not acted in contravention of the APA in turning down her request. *Falkowski* v. *EEOC*, slip op. at 2-3. We find, however, that the reasons for denial articulated by the Department are facially insufficient to establish the reasonableness of its decision. Moreover, the evidence suggests that DOJ may have accorded Ms. Falkowski disparate treatment under its existing regulations and practice. The rationality of the Department's decision therefore cannot be determined without further factual inquiry, and we accordingly hold that summary judgment as to this final cause of action was inappropriate.[16]

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[16] As an alternative ground for supporting the District Court's grant of summary judgment on this claim, the Department of Justice urges that its decision is unreviewable under the APA as action "committed to agency discretion" under 5 U.S.C. § 701(a)(2) (1976). *See* Brief for Defendants-Appellees at 31-38. In support of its position, the Department sets forth a detailed analysis following the three-factor test spelled out by this Court in Natural Resources Defense Council, Inc. *v.* SEC, 606 F.2d 1031, 1043-47 (D.C. Cir. 1979). We have considered the government's arguments on this point and find them unpersuasive.

Under the first factor of the *Natural Resources* test, the Department relies particularly on the nonmandatory language of its own regulations to conclude that plaintiff has no legally protectable interests to be safeguarded through judicial oversight. *See* Brief for Defendants-Appellees at 33 (*"The Department of Justice Policy Statement ... merely provides that*

1. *The Babcock Letter*

In concluding that the Department of Justice did not act arbitrarily or capriciously in denying Ms. Falkowski's request for government counsel, the District

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'[r]epresentation by private counsel at federal expense *may* be provided to a federal employee' if certain preconditions have been met.") (quoting 28 C.F.R. § 50.16 (a) (1979) (emphasis added)). Yet the federal courts have long held discretionary denials of relief or assistance to be reviewable under the APA. *See, e.g.*, Rassano *v.* INS, 492 F.2d 220, 227 (7th Cir. 1974) (language in 8 U.S.C. § 1254 (1970) stating that "the Attorney General may, in his discretion, suspend deportation" does not bar review under the APA). The policy reasons supporting reviewability in such cases are clear. Although an aggrieved individual may have no "right" to the relief provided by the agency, he is entitled to an agency decision on his request that is at least rational and free from abuse of discretion.

Under the second factor of the *Natural Resources* test, DOJ argues that the burden of defending denial-of-representation decisions in court will divert scarce institutional resources from its congressionally assigned mission of defending other federal employees in court. Because judicial review inherently involves some costs of litigation, this fact alone cannot decide the issue of reviewability. Rather, the logic of the *Natural Resources* test rests on a pragmatic weighing of all three factors against the strong presumption of judicial review created by the APA. *See* 606 F.2d at 1043-44. Given the Department's broad latitude to determine when litigation on behalf of government defendants is in the interests of the United States, most challenges to its discretion can be handled at the dismissal or summary judgment stage. We do not believe that this reduced burden militates against the APA's presumption of reviewability.

Under the third factor, the Department points to the myriad issues bearing upon representation decisions and concludes that such determinations are inappropriate subjects for judicial review. This court appreciates the numerous legal, policy, and fiscal factors that impinge upon the Department's decisions in this area. Yet judicial review does not call for courts to substitute their own judgment for that of the agency. On the contrary, the reviewing court's scrutiny of substantive agency decisions is in most cases limited to determining whether the reasons articulated by the agency make sense. While this court has a modest appreciation for the limits of its abilities, we do not feel that such a task is beyond our powers.

Court relied heavily on the three reasons set forth in Assistant Attorney General Babcock's letter of May 17, 1977. Each of those reasons purported to show why reimbursing Ms. Falkowski for her legal expenses would not be "in the interest of the United States" as mandated by 28 C.F.R. § 50.15 (a)(2) (1979). We conclude that the various rationales proposed by the Assistant Attorney General are insufficient on their face to support the government's motion for summary judgment on the issue of reasonableness under section 706(2)(A) of the APA.

The first reason cited in the Babcock letter for denying Ms. Falkowski's request was "the clearly personal nature of the dispute between Ms. Falkowski and Mr. Perry." This does not seem a rational reason for the conclusion based upon it. Indeed, most Title VII suits concerning individual incidents of discrimination or retaliation involve disputes intensely personal in nature. Why this happenstance justifies denying government legal representation to a federal officer sued by her immediate subordinate is not immediately apparent to this court. In fact, it would appear that government counsel represent federal officials as defendants in quite acrimonious Title VII actions on a regular basis. *See, e.g., Carson* v. *Bolger*, 510 F. Supp. 106 (E.D. Mo. 1981).

The second reason given by the Assistant Attorney General was "the tape recording by Ms. Falkowski of Mr. Perry's remarks in contravention of an internal EEOC directive." This rationale, as well, does not withstand scrutiny standing on its own. The departmental regulations cited in the Assistant Attorney General's letter provide for hiring private legal counsel at government expense to defend federal officials sued in their individual capacities, *even though those officials are simultaneously under federal criminal investigation for the same acts for which representation is provided. See* 28 C.F.R. § 50.15 (a)(5) (1979). Indeed, in a

1977 letter to United States District Judge Gerhard Gesell, the Assistant Attorney General noted that DOJ had retained private counsel to defend numerous federal officials then under criminal investigation by the Department of Justice. *See* Letter from Assistant Attorney General Babcock to District Judge Gesell (May 1977), *reprinted in* STAFF OF SUBCOMM. ON ADMINISTRATIVE PRACTICE AND PROCEDURE OF THE SENATE COMM. ON THE JUDICIARY, 95TH CONG., 2d SESS., REPORT ON JUSTICE DEPARTMENT RETENTION OF PRIVATE LEGAL COUNSEL TO REPRESENT FEDERAL EMPLOYEES IN CIVIL LAWSUITS 150-55 (Comm. Print 1978). It is not clear why the alleged violation of an internal agency directive disqualifies a federal officer for government-provided legal representation and suspected criminal activity does not.

The third reason given for turning down Ms. Falkowski's request was "the existence of separate actions by Ms. Falkowski and Mr. Perry challenging proposed personnel actions against them." This rationale is, if anything, the least satisfactory of all. On its face, it appears retaliatory and, as such, an impermissible basis for agency action.[17] Federal officers cannot become ineligible for government-provided legal defense in individual-capacity suits merely because they have challenged earlier personnel actions against them. To conclude otherwise would impose an impermissible burden on the rights granted federal workers by Congress and the Constitution, in this case under Title VII of the

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[17] The government in its brief asserts that the Assistant Attorney General's reference to the Perry and Falkowski litigation merely illustrates the extent of the personal feud between them. *See* Brief for Defendants-Appellees at 30 n.* The problem with this interpretation is that Ms. Falkowski's suit was not against Bertram Perry, but against the EEOC and her administrative supervisors, including one Lowell Perry, former chairman of the EEOC. *See* Appendix at 74 n.5.

Civil Rights Act of 1964, 42 U.S.C. § 2000e-16 (1976 & Supp. V. 1981).

2. *Disparate Treatment*

At the time DOJ rendered its decision against Ms. Falkowski, cases in which federal defendants had been denied government-provided legal counsel were apparently few and far between. During 1977 and 1978, both houses of Congress conducted hearings into Department of Justice practice and policy regarding retention of private legal counsel to defend government officials in civil lawsuits. These investigations were prompted by the Department's escalating expenditures for private legal counsel in individual-capacity suits that had burgeoned following the Senate Watergate and Intelligence Committee hearings. *See* STAFF OF SUBCOMM. ON ADMINISTRATIVE PRACTICE AND PROCEDURE OF THE SENATE COMM. ON THE JUDICIARY, *supra*, at ix-xiv, 1.

A Senate committee staff report prepared following the 1977-78 hearings reviewed DOJ practice and policy in this area and concluded,

> Apparently, the Department's position is that it is in the public interest to defend any conduct which has not been held to be criminal.... The practical result is that, "however gross that conduct may seem to the layman," the Department has *not once* found the public interest to be independent grounds for refusing to represent an employee sued in his or her individual capacity when the Department has determined such employee was acting within the scope of his or her employment.

Id. at 6 (emphasis added).[18]

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[18] The committee staff's conclusion parallels the position expressed by the Attorney General in the explanatory materials accompanying the initial promulgation of DOJ regulations in

This finding hardly comports with the position taken by the Department in denying Ms. Falkowski's request for counsel, and raises a strong inference that her request was accorded disparate treatment in comparison to other applications recently processed by the Department. Because DOJ failed to explain this apparent incongruity in its treatment of similarly situated applicants, the District Court should have withheld final judgment on Ms. Falkowski's claim pending fuller development of the facts. *Cf. Contractors Transport Corp. v. United States*, 537 F.2d 1160, 1162 (4th Cir. 1976) (ICC order remanded for failure to explain agency's disparate treatment of similarly situated applicants).

After reviewing the reasons articulated in Assistant Attorney General Babcock's letter and considering the apparent contemporaneous practice of the Department of Justice, we conclude that the rationality of the Department's decision in Ms. Falkowski's case cannot be established absent further factual exploration. The District Court's grant of summary judgment on plaintiff's final claim was therefore inappropriate, and we accordingly reverse.[19]

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this area in January 1977. *See* Limitation for Representation of Federal Employees, 42 Fed. Reg. 5695 (1977) (Supplementary Information). For a discussion of these regulations, see *supra* note 13.

[19] As an alternative ground for upholding the District Court's grant of summary judgment on all three statutory claims, the defendant government agencies argue that the relief plaintiff seeks is in essence money damages, and that neither the APA nor Title VII provides for such damages against the United States, *See* Brief for Defendants-Appellees at 38-43 (citing 5 U.S.C. § 702 (1976) and 42 U.S.C. § 2000e-5(g) (1976)). They therefore contend that plaintiff's suit is barred by the doctrine of sovereign immunity.

We do not find it necessary to characterize the attorneys' fees plaintiff seeks as money damages or some other form of relief.

IV

On the basis of the filings and other documents before the District Court, summary judgment was properly granted with respect to plaintiff's first cause of action claiming reimbursement for her legal expenses in the *Perry* v. *Golub* case. As to her remaining two causes of action seeking representation and reimbursement in the *Perry* v. *Falkowski* litigation, we find that genuine issues of material fact remain in the case precluding summary judgment at this juncture. We therefore remand these two claims to the District Court for further proceedings in conformity with this opinion.

It is so ordered.

Should plaintiff prevail at the liability stage under Title VII and the APA, the most appropriate remedy would not appear to be an order compelling agency reimbursement of the withheld payment, but a remand to the Department of Justice to reconsider plaintiff's request free of any biased input from EEOC and on the basis of rational decisionmaking criteria. Such relief is clearly equitable in nature and not money damages.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action
No. 81-1776

EVELYN FALKOWSKI, PLAINTIFF

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL., DEFENDANTS

[Filed Mar. 4, 1982]

MEMORANDUM

Evelyn Falkowski brings this action against the Equal Employment Opportunity Commission (EEOC) and the Department of Justice (DOJ), arising out of their refusal to provide her with legal representation and reimbursement of legal fees for suits brought against her by a subordinate.[1] The defendants have

[1] Mrs. Falkowski's complaint requests that the United States be compelled "to pay her legal fees and provide her with legal defense in connection with two actions in which she was sued..." Mrs. Falkowski was first sued in 1975 in *Perry* v. *Golub*, No. 75-G-1476-S (N.D.Ala.) Not only does she admit tht EEOC attorneys represented her in that action, but the fact has been noted in two separate judicial opinions. *See Perry* v. *Golub*, 74 F.R.D. 360, 369 (N.D.Ala. 1976); *Falkowski* v. *Perry*, No. 76-G-0545-S, slip. op. at 16 (N.D.Ala. Feb. 17, 1981). Nevertheless, plaintiff claims she has been damaged by EEOC's failure to provide her with an adequate representation and defense in that action. To the extent that Mrs. Falkowski is attempting to state a cause of action under Title VII with regard to that suit, the action is time-barred because she did not properly pursue her administrative remedies by filing a formal complaint with the EEOC within 30 days, *see* 29 C.F.R.

moved to dismiss, or in the alternative, for summary judgment. Mrs. Falkowski has opposed the defendants' motion and has also moved to amend her complaint.[2]

Although it recites several statutory and constitutional bases for jurisdiction, Mrs. Falkowski's complaint states causes of action only under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000 *et seq.* (1976 & Supp. III 1979) (Title VII), and the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.* (1976 & Supp. III 1979) (APA). Because "the EEOC and the Department of Justice regularly and routinely defend federal employees who are acting within the scope of their employment in connection with lawsuits brought against said employees in connection with their employment," Mrs. Falkowski claims that "the failure of the EEOC to provide legal representation for plaintiff is . . . a result of discrimination." However, only DOJ may authorize legal representation or reimbursement of fees. *See* 28 U.S.C. § 517 (1976); 28 C.F.R. §§ 50.15, .16 (1980). The role of the EEOC is limited to recommending to the DOJ that representation be authorized and certifying that the employee in question was acting within the scope of his or her employment. 28 C.F.R. § 50.15(a)(1). Documents as well as an affidavit filed on behalf of the Government establish that the EEOC did recommend that representation be authorized and certified that Mrs. Falkowski was acting within the scope of her employment. Mrs. Falkowski presents no admissible evidence directly to the contrary and has failed to

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§ 1613.214(a)(1)(i) (1980). *E.g.*, *Milton* v. *Brown*, 471 F. Supp. 150, 152-53 (D.D.C. 1979), *modified on other grounds*, 645 F.2d 1070, 1074-77 (1981).

[2] Mrs. Falkowski's motion for leave to amend her complaint seeks to add the names of J. Clay Smith, Acting Chairman of the EEOC, and William French Smith, Attorney General of the United States, as additional defendants.

establish a prima facie case. *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248, 252-53 (1981); *McDonnell Douglas* v. *Green*, 411 U.S. 792, 802 (1973).

The claim under the APA alleges that "the refusal of the EEOC and DOJ to provide plaintiff defense in these actions is arbitrary and capricious and a violation of their duty under law." As noted, the EEOC is without power to authorize legal defense and fully fulfilled its duty by providing DOJ with the required information. The issue of whether the DOJ's decision not to represent or reimburse Mrs. Falkowski is subject to judicial review need not be decided here. It is clear that the DOJ's decision was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," so as to be in violation of the APA. 5 U.S.C. § 706(2)(A). In accordance with the applicable statute and regulation, the DOJ decided that it was not "in the interest of the United States" to provide legaal representation or reimbursement to Mrs. Falkowski. *See* 28 C.F.R. § 50.15(a)(2). *See also* 28 U.S.C. §§ 516-17. The reasons for this decision are set forth in then-Assistant Attorney General Barbara Allen Babcock's letter of May 17, 1979, to Mrs. Falkowski's private counsel:

> In light of the clearly personal nature of the dispute between Ms. Falkowski and Mr. Perry giving rise to the litigation, the tape recording by Ms. Falkowski of Mr. Perry's remarks in contravention of an internal EEOC directive, and the existence of separate actions by Ms. Falkowski and Mr. Perry challenging proposed personnel actions against them, I do not believe it is in the interest of tthe United States to reimburse Ms. Falkowski for her legal costs. Accordingly, pursuant to 28 C.F.R. § 50.15(a)(2), I am denying Ms. Falkowski's request.

In view of the foregoing, defendants' motion for summary judgment is granted. Since the proposed amendment of Mrs. Falkowski's complaint would have no effect on the foregoing determination, that motion is denied.

An appropriate order follows.

/s/ John Lewis Smith, Jr.

United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action
No. 81-1776

EVELYN FALKOWSKI, PLAINTIFF

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL., DEFENDANTS

[Filed Mar. 4, 1983

ORDER

Upon consideraton of defendant's motion for dismissal or, in the alternative, for summary judgment, plaintiff's opposition, plaintiff's motion for leave to amend the complaint, defendants' reply to plaintiff's opposition, plaintiff's surrebuttal, the arguments of counsel and the entire record, it is by the Court this 3rd day of March 1982

ORDERED that defendants' motion for summary judgment is granted, and it is further

ORDERED that plaintiff's motion to amend the complaint is denied.

/s/ _____
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1983

Civil Action No. 81-01776

EVELYN FALKOWSKI, APPELLANT

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.

[Filed Jan. 12, 1984]

BEFORE: ROBINSON, *Chief Judge;* WILKEY, *Circuit Judge* and MCGOWAN, *Senior Circuit Judge*

ORDER

On consideration of the Petition for Rehearing of Appellees, filed November 28, 1983, it is

ORDERED by the Court that the aforesaid Petition is denied.

Per Curiam

For The Court:

GEORGE A. FISHER,
Clerk

By: Robert A. Bonner

ROBERT A. BONNER
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
SEPTEMBER TERM, 1983

No. 82-1446

EVELYN FALKOWSKI, APPELLANT

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.

[Filed Jan. 12, 1984]

BEFORE: ROBINSON, *Chief Judge;* WRIGHT, TAMM, WILKEY, WALD, MIKVA, EDWARDS, GINSBURG, BORK, SCALIA and STARR, *Circuit Judges*

ORDER

Appellee's Suggestion for Rehearing *en banc*, filed November 28, 1983, has been circulated to the full Court. A majority of the judges in regular active service has not voted in favor of the suggestion. On consideration of the foregoing, it is

ORDERED by the Court *en banc* that the suggestion is denied.

Per Curiam

For The Court:

GEORGE A. FISHER, *Clerk*

By: Robert A. Bonner

ROBERT A. BONNER
Chief Deputy Clerk

Circuit Judges Bork, Scalia and Starr would grant the suggestion.

A statement by Circuit Judge Starr, joined in by Circuit Judge Scalia, is attached.

No. 82-1446

EVELYN FALKOWSKI

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.

In the case before us, a panel of this court has concluded that judicial review under the Administrative Procedure Act is appropriate with respect to Executive Branch decisions to authorize legal representation of government employees in suits brought against them. With all respect, this decision seems quite plainly wrong. But right or wrong, the panel's opinion treats in summary fashion[1] an issue of such grave importance under bedrock principles of separation-of-powers that

[1] Before the panel and in its petition for rehearing, the Government argued that its decision not to provide legal representation to the plaintiff was "committed to agency discretion" under the Administrative Procedure Act, 5 U.S.C. § 701(a)(2)(1976) and was, therefore, unreviewable. The panel's opinion, after devoting fifteen pages to a recounting of the bizarre history of the courtroom activities of an extraordinarily litigation-prone plaintiff, devotes exactly one footnote to the dispatch of this contention. In articulating by way of footnote why the Attorney General's decision is not unreviewable under the analysis set forth in *Natural Resources Defense Council, Inc.* v. *SEC*, 606 F.2d 1031, 1043-47 (D.C. Cir. 1979), the opinion cites a solitary case in support of its conclusion. That case, from the 7th Circuit, had to do with a discretionary decision by the Attorney General under the Nation's immigration laws to suspend deportation of an alien. That setting is quite plainly a far cry from the determination whether to afford legal representation to an incumbent federal employee—a situation that triggers an entirely different set of both private interests and public policy considerations.

the case clearly warrants careful consideration by the entire court. I therefore respectfully dissent from the court's declination of the suggestion to rehear the case *en banc*.

The statutory provision in question, 8 U.S.C. § 517, authorizes the Attorney General to bring legal actions, to intervene in actions, or to file amicus briefs in actions filed by parties other than the United States in courts around the nation. This range of choices by the Attorney General is guided solely by the broad standard, "to attend to the interests of the United States."[2] In my view a court cannot appropriately demand reasons for litigation decisions statutorily entrusted to the Attorney General or his representatives to evaluate judicially whether those decisions, in the panel's words, "make sense" under the APA. Slip. op. at 21 n.16. Separation-of-powers doctrines, not to mention the clear language of the APA, are deeply implicated by judicial evaluations of reasons undergirding the Executive's determinations either to take or to refrain from taking actions before this branch. As the Court said in *Buckley* v. *Valeo:*

> The Commission's enforcement power, exemplified by its discretionary power to seek judicial relief, is authority that cannot possibly be regarded as merely in aid of the legislative function of Congress. A lawsuit is the ultimate remedy for a breach of the law, and it is to the President, and not to the Congress, that the Constitution entrusts the responsibility to "take Care that the Laws be faithfully executed." Art. II, § 3.

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[2] Section 517 provides:

> The Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States.

424 U.S. at 138. Just as the Executive's "discretionary power to seek judicial relief" is preeminently separate from legislative powers, so also it is preeminently separate from judicial powers. The decision not to prosecute has been the archetype of unreviewable executive action. There is no reason in logic or precedent why the decision not to litigate in civil matters should be treated differently.

In wading into this formidable thicket, courts will invariably and needlessly face grave difficulties in evaluating the Executive's articulated reasons against a standard as broad as the "interests of the United States." This intrusion by the Article III branch into the discretionary judgments of a coordinate branch is particularly sensitive in the context of reviewing litigation decisions by the Executive, where various considerations of policy, tactics and the allocation of limited resources require complex and delicate balancing. As the Supreme Court has stated in another context in which it found judicial review inappropriate, "[t]hese are matters on which experts may disagree; they involve nice issues of judgment and choice ... which require the exercise of informed discretion." *Panama Canal Co.* v. *Grace Line, Inc.*, 356 U.S. 309, 317 (1958). The difficulties inherent in judicial evaluation of Executive Branch litigation determinations will be exacerbated where, as here, the courts will not, by virtue of the "deliberative process' privilege, have access to all the information in the hands of the Executive in reaching its decision.

In my view judicial review becomes no more appropriate when the protection of the "interests of the United States" takes the form of a decision to defend—or not to defend—an employee in a suit brought against him.[3] The same broad statutory language is be-

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[3] Indeed, the panel does not offer any rationale limiting judicial review of actions by the Attorney General under section 517 to decisions to represent government employees.

ing interpreted. The same separation-of-powers concerns and difficulties of evaluation are powerfully extant. And, critically, the Department of Justice regulations governing employee representation do not in any way surrender or significantly cabin the discretion conferred by statute upon the Executive. The regulations do not grant employees any entitlement to representation; to the contrary, the regulations merely state that the government "may" provide representation. 28 C.F.R. § 50.15. Indeed, by their terms the regulations provide that representation will not be provided when it is "not in the interest of the United States" to do so. *Id.* Unlike the panel, I see no warrant for judicial review to safeguard a set of particularized interests when the governing statute itself confers absolutely no weight upon those interests.

Inasmuch as the panel's decision repesents a significant and unjustified intrusion into the prerogatives of a sister branch and does violence to the particular statutory standard governing judicial review, I respectfully dissent.

APPENDIX D

STATUTES AND REGULATIONS

5 U.S.C. 701(a) provides in pertinent part:

> This chapter applies, according to the provisions thereof, except to the extent that—
>
> (1) statutes preclude judicial review; or
>
> (2) agency action is committed to agency discretion by law.

28 U.S.C. 516 provides:

> Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General.

28 U.S.C. 517 provides:

> The Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States.

28 U.S.C. 518 provides:

> (a) Except when the Attorney General in a particular case directs otherwise, the Attorney General and the Solicitor General shall conduct and argue suits and appeals in the Supreme Court and suits in the United States Claims Court or in the United States Court of Appeals for the Federal Circuit and in the Court of International Trade in which the United states is interested.
>
> (b) When the Attorney General considers it in the interests of the United States, he may personally conduct and argue any case in a court of the United States in which the United States is interested, or he may direct the Solicitor General or any officer of the Department of Justice to do so.

28 U.S.C. 519 provides:

> Except as otherwise authorized by law, the Attorney General shall supervise all litigation to which the United States, an agency, or officer thereof is a party, and shall direct all United States attorneys, assistant United States attorneys, and special attorneys appointed under section 543 of this title in the discharge of their respective duties.

28 C.F.R. 50.15 provides:

> (a) Under the procedures set forth below, a federal employee (hereby defined to include present and former Federal officials and employees) may be provided representation in civil and Congressional proceedings and in state criminal proceedings in which he is sued, subpoenaed, or charged in his individual capacity, not covered by § 15.1 of this chapter, when the actions for which representation is requested reasonably appear to have been performed within the scope of the employee's employment and providing representation would otherwise be in the interest of the United States. No special form of request for representation is required when it is clear from the pleadings in a case that the employee is being sued solely in his official capacity and only equitable relief is sought. (See USAM 4-13.000)
>
> (1) When an employee believes he is entitled to representation by the Department of Justice in a proceeding, he must submit forthwith a written request for that representation, together with all process and pleadings served upon him, to his immediate supervisor or whomever is designated by the head of his department or agency. Unless the employee's employing federal agency concludes that representation is clearly unwarranted, it shall submit, in a timely manner, to the Civil Division or other appropriate litigating division (Antitrust, Civil Rights, Criminal, Land and Natural Resources or the Tax Division), a statement con-

taining its findings as to whether the employee was acting within the scope of his employment and its recommendation for or against providing representation. The statement should be accompanied by all available factual information. In emergency situations the litigating division may initiate conditional representation after a telephone request from the appropriate official of the employing agency. In such cases, the written request and appropriate documentation must be subsequently provided.

(2) Upon receipt of the individual's request for counsel, the litigating division shall determine whether the employee's actions reasonably appear to have been performed within the scope of his employment and whether providing representation would be in the interest of the United States. In circumstances where considerations of professional ethics prohibit direct review of the facts by attorneys of the litigating division (e.g. because of the possible existence of inter-defendant conflicts) the litigating division may delegate the fact-finding aspects of this function to other components of the Department or to a private attorney at federal expenses.

(3) Attorneys employed by any component of the Department of Justice who participate in any process utilized for the purpose of determining whether the Department should provide representation to a federal employee, undertake a full and traditional attorney-client relationship with the employee with respect to application of the attorney-client privilege. If representation is authorized, Justice Department attorneys who represent an employee under this section also undertake a full and traditional attorney-client relationship with the employee with respect to the attorney-client privilege. Any adverse information communicated by the client-employee to an attorney during the course of such attorney-client relationship shall not be disclosed to anyone, either inside or outside the Department,

other than attorneys responsible for representation of the employee unless such disclosure is authorized by the employee. Such adverse information shall continue to be fully protected whether or not representation is provided, and even though representation may be denied or discontinued. The extent, if any, to which attorneys employed by an agency other than the Department of Justice undertake a full and traditional attorney-client relationship with the employee with respect to the attorney-client privilege, either for purposes of determining whether representation should be provided or to assist Justice Department attorneys in representing the employee, shall be determined by the agency employing the attorneys.

(4) Representation is not available in federal criminal proceedings. In other proceedings for which representation is sought, where there appears to exist the possibility of a federal criminal investigation or indictment relating to the same subject matter, the litigating division shall contact a designated official in the Criminal, Civil Rights or Tax Division or other prosecutive authority within the Department (hereinafter "prosecuting division") to determine whether the employee is either a subject of a federal criminal investigation or a defendant in a federal criminal case. An employee is the subject of an investigation if, in addition to being circumstantially implicated by having the appropriate responsibilities at the appropriate time, there is some evidence of his specific participation in a crime.

(5) If a prosecuting division of the Department indicates that the employee is not the subject of a criminal investigation concerning the act or acts for which he seeks representation, then representation may be provided if otherwise permissible under the provisions of this section. Similarly, if the prosecuting division indicates that there is an ongoing investigation, but into a matter unrelated to

that for which representation has been requested, then representation may be provided.

(6) If the prosecuting division indicates that the employee is the subject of a federal criminal investigation concerning the act or acts for which he seeks representation, the litigating division shall inform the employee that no representation by Justice Department attorneys will be provided in the related civil, congressional, or state criminal proceeding. In such a case, however, the litigating division, in its discretion, may provide a private attorney to the employee at federal expense under the procedures of § 50.16 provided no decision has been made to seek an indictment or file an information against the employee.

(7) In any case where it is determined that Department of Justice attorneys will represent a federal employee the employee must be notified of his right to retain private counsel at his own expense. If he elects representation by Department of Justice attorneys, the employee and his agency shall be promptly informed.

(i) That in actions where the United States, any agency, or any officer thereof in his official capacity is also named as a defendant, the Department of Justice is required by law to represent the United States and/or such agency or officer and will assert all appropriate legal positions and defenses on behalf of such agency, officer and/or the United States.

(ii) That the Department of Justice will not assert any legal position or defense on behalf of any employee sued in his individual capacity which is deemed not to be in the interest of the United States.

(iii) Where appropriate, that neither the Department of Justice nor any agency of the United States Government is obligated to pay or to indemnify the defendant employee for any judgment for

money damages which may be rendered against such employee;

(iv) That any appeal by Department of Justice attorneys from an adverse ruling or judgment against the employee may only be taken upon the discretionary approval of the Solicitor General, but the employee-defendant may pursue an appeal at his own expense whenever the Solicitor General declines to authorize an appeal and private counsel is not provided at federal expense under the procedures of § 50.16; and

(v) That while no conflict appears to exist at the time representation is tendered which would preclude making all arguments necessary to the adequate defense of the employee, if such conflict should arise in the future the employee will be promptly advised and steps will be taken to resolve the conflict as indicated by paragraphs (a)(6), (a)(9) and (a)(10) of this section, and by § 50.16.

(8) If a determination not to provide representation is made, the litigating division shall inform the agency and/or the employee of the determination.

(9) If conflicts exist between the legal and factual positions of various employees in the same case which make it inappropriate for a single attorney to represent them all, the employees may be separated into as many compatible groups as is necessary to resolve the conflict problem and each group may be provided with separate representation. Circumstances may make it advisable that private representation be provided to all conflicting groups and that direct Justice Department representation be withheld so as not to prejudice particular defendants. In such situations, the procedures of § 50.16 will apply.

(10) Whenever the Solicitor General declines to authorize further appellate review or the Department attorney assigned to represent an employee becomes aware that the representation of the employee could involve the assertion of a position that

conflicts with the interests of the United States, the attorney shall fully advise the employee of the decision not to appeal or the nature, extent, and protential consequences of the conflict. The attorney shall also determine, after consultation with his supervisor (and, if appropriate, with the litigating division) whether the assertion of the position or appellate review is necessary to the adequate representation of the employee and

(i) If it is determined that the assertion of the position or appeal is not necessary to the adequate representation of the employee, and if the employee knowingly agrees to forego appeal or to waive the assertion of that position, governmental representation may be provided or continued; or

(ii) If the employee does not consent to forego appeal or waive the assertion of the position, or if it is determined that an appeal or assertion of the position is necessary to the adequate representation of the employee, a Justice Department lawyer may not provide or continue to provide the representation; and

(iii) In appropriate cases arising under paragraph (a)(10)(ii) of this section, a private attorney may be provided at federal expense under the procedures of § 50.16.

(11) Once undertaken, representation of a federal employee under this subsection will continue until either all appropriate proceedings, including applicable appellate procedures approved by the Solicitor General, have ended, or until any of the bases for declining or withdrawing from representation set forth in this section is found to exist, including without limitation the basis that representation is not in the interest of the United States. If representation is discontinued for any reason, the representing Department attorney on the case will seek to withdraw but will take all reasonable steps to avoid prejudice to the employee.

(b) Representation is not available to a federal employee whenever;

(1) The representation requested is in connection with a federal criminal proceeding;

(2) The conduct with regard to which the employee desires representation does not reasonably appear to have been performed within the scope of his employment with the federal government;

(3) It is otherwise determined by the Department that it is not in the interest of the United States to provide representation to the employee.

28 C.F.R. 50.16 provides:

(a) Representation by private counsel at federal expense is subject to the availability of funds and may be provided to a federal employee only in the instances described in § 50.15(a)(6), (9) and (10), and in appropriate circumstances, for the purposes set forth in § 50.15(a)(2).

(b) To ensure uniformity in retention procedures among the litigating divisions, the Civil Division shall be responsible for establishing procedures for the retention of private counsel including the setting of fee schedules. In all instances where a litigating division decides to retain private counsel under § 50.16, the Civil Division shall be consulted before the retention is undertaken.

(c) Where private counsel is provided, the following procedures shall apply;

(1) While the Department of Justice will generally refer to the employee's choice of counsel the Department must approve in advance any private counsel to be retained under this section. Where national security interests may be involved, the Department of Justice will consult with the agency employing the federal defendant seeking representation.

(2) Federal payments to private counsel for an employee will cease if the private counsel violates any of the terms of the retention agreement or the Department of Justice.

(i) Decides to seek an indictment of, or to file an information against, that employee on a federal criminal charge relating to the conduct concerning which representation was undertaken;

(ii) Determines that the employee's actions do not reasonably appear to have been performed within the scope of his employment;

(iii) Resolves any conflict described herein and tenders representation by Department of Justice attorneys;

(iv) Determines that continued representation is not in the interest of the United States;

(v) Terminates the retainer with the concurrence of the employee-client for any reason.